NO. SC87360

SUPREME COURT OF MISSOURI

MILDRED JAMISON, et al.,

Respondents,

v.

STATE OF MISSOURI,
DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF FAMILY SERVICES

Appellant.

Appeal from the Circuit Court of Cole County,
The Honorable Richard G. Callahan, Judge

APPELLANTS' BRIEF

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DIVISION OF FAMILY SERVICES

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JURISDICTIONAL STATEMENT

This appeal involves the question of whether RSMo. § 210.110-.152 is unconstitutional. The circuit court held that § 210.110 fails to comply with the requirement of procedural due process under Mo. Const. Article I, Section 10. Therefore, this appeal involves the validity of a Missouri statute and falls within the exclusive appellate jurisdiction of the Missouri Supreme Court. Mo. Const., Art. V, Sec. 3.

STATEMENT OF FACTS

A. General Facts and Administrative Review of the Investigator's Probable Cause Finding[1]

On January 2, 2003, the Department of Social Services' child abuse and neglect hotline received an anonymous phone call that Mildred Jamison, and Betty Dotson (respondents), and a third party, Belet, neglected several children under their care by failing to supervise them. App. p. 12-13. The reporter stated that on December 29, 2002, Jamison and Dotson, employees of Faith House residential treatment center for children in St. Louis, Missouri, failed to supervise several children under their care. App. p. 12-23, 37-41, LF p. 68. According to the reporter, because respondents were not supervising the children under their care, a male Faith House ward was able to sneak out of his room at night, enter the room of a female ward, and perform sexual acts with her. App. p. 12, 14.

[1]This appeal does not involve a question as to whether there was enough evidence to support a probable cause finding of neglect against respondents; the trial court ruled on summary judgment without reaching that issue. Further, this appeal does not ask whether the administrative finding was correct. The facts giving rise to the probable cause findings, and the events that occurred thereafter, are set forth simply to illustrate the statutory procedures.

After receiving the hotline phone call, Out of Home Investigator (OHI) investigator Donna Sheffer began investigating the allegations to determine whether there was probable cause that the actions occurred. App. p. 26. In the process of performing her investigation, Sheffer collected various documents from both the respondents and from other sources, and interviewed eleven people, including the victim, respondents, other alleged perpetrators of neglect, several witnesses, and medical doctors. App. p. 12-26. During the course of the interviews both the victims and the respondents presented testimony and evidence relating to the events that gave rise to the allegation of neglect. App. p. 12-26. Further, the investigator contacted several witnesses and received information from those witnesses which either corroborated or conflicted with prior testimony. App. p. 13-23.

Based on the testimony and documentation provided to her by the witnesses, the victims, and the respondents, Sheffer concluded that there was probable cause that Jamison, Dotson, and Belet neglected the children under their care. App. p. 24-26. Sheffer then provided all three individuals with a letter outlining the facts and testimony she relied on. App. p. 27-34. Sheffer also informed all three individuals that if they disagreed with the findings of the investigator they could review their file and the information contained in it. App. p. 27-34. Further, Sheffer told them that they could pursue an administrative review of the investigators decision first with the OHI Unit Manager, and then, if necessary, with the Child Abuse and Neglect Review Board (CANRB). App. p. 27-34. The letter sent to all three individuals provided them with

specific information regarding how to file an appeal, including deadlines, where to send their appeal, and that they could provide additional information relevant to the allegations. App. p. 27-34. Finally, Sheffer informed all three individuals that any information contained in their files would remain confidential and would not be released to anyone, except as provided for by statute. App. p. 27-34. All three individuals took advantage of this information.

On March 28, 2003, Jamison, Dotson, and Belet, through an attorney, filed an appeal with Sheffer's OHI Unit Manager. App. p. 35. They pointed out what that they thought were Sheffer's mistakes in summarizing interviews, made factual errors, and ultimately in the conclusion that Sheffer made. App. p. 35. They did not feel that there was sufficient information to support Sheffer's conclusion that there was probable cause that abuse or neglect occurred. App. p.37. Finally, not only did Jamison, Dotson, and Belet point out what they thought were mistakes in the investigation, they also provided affidavits setting forth their own version of the events of December 29, 2002. App. p. 37-41. Despite the additional information, Sheffer's OHI unit manager upheld the original probable cause finding, and passed that finding to the CANRB for additional review. App. p. 42-45.

Respondents had a hearing before the CANRB on July 22, 3003.[2] App. p. 44. The CANRB upheld the probable cause finding that respondents neglected children under their care.[3] App. p. 47.

B. Procedure Before the Trial Court

Respondents filed their initial petition for de novo review on October 9, 2003, in the Circuit Court of St. Louis City. LF at 285-303. On July 28, 2005, respondents filed their amended motion for summary judgment, statement of facts, and supporting legal memorandum in the Circuit Court of Cole County arguing that RSMo § 210.110 - .152 is unconstitutional. LF at 32-36, 60-85. Respondents did not argue in their motion for summary judgment that there was no evidence to support the probable cause determination, and at no point did the trial court consider whether there was evidence to support the finding of probable cause.

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[2]It is unknown when Belete had her hearing. However, we do know that after Belete presented information to the CANRB that the CANRB did not uphold the determination of probable cause. App. p. 48.

[3]Only eight months and nine days passed from the time of the initial phone call to the hotline to the finding by the CANRB upholding the probable cause finding of neglect. This includes the initial investigation and two appeals by multiple individuals.

C. The Missouri Child Protection System

1. History of the Child Abuse/neglect Reporting Statutes

Prior to 1965, Missouri did not have a formal child abuse reporting law. All incidents of child physical abuse were dealt with in the criminal context. In 1965, House Bill 118 established the first child abuse reporting law. This gave physicians the discretion to report to the appropriate law enforcement office physical injuries of children under twelve years of age who were brought to the physician for care, treatment, or examination if the physician believed the injuries were intentional and caused by a child's parent(s) or another person responsible for the child's care. This first statute was a permissive statute, not a mandatory statute.

In 1969, House Bill 40 significantly modified RSMo.§210.105 (1965). First, the language was changed from physical injury to physical abuse and neglect. Next, the group of children covered by the statute was expanded to include all children under seventeen years of age. The list of persons expected to report child abuse was also expanded to include professionals from several different fields. Reporting was no longer optional and instead became mandatory, and all reports had to be made to either the county welfare office or the county juvenile officer.

HB40 also included §210.107, which provided guidelines on how child abuse reports were to be investigated by either the welfare office or the juvenile office and how services were to be provided to the family. Section 210.107 included a provision permitting the welfare office to forward the report on to the appropriate law enforcement

office and a requirement to report to the juvenile office. The juvenile office, too, was permitted but not required to forward the report to law enforcement. Finally, each report received by the welfare office and juvenile office was required to forward the report to the central state welfare office. The state office was required to create and maintain a database which cross-referenced all reports to assist officials in determining whether a child had been the subject of previous physical abuse or neglect. This cross-referenced database could be seen as the precursor to the Central Registry. However, no provisions were made for who, outside of the Division, would have access to the information contained in the database.

In 1974, and in response to the federal Child Abuse Prevention and Treatment Act (CAPTA), PL 93-247, Missouri adopted a greatly expanded child abuse reporting law. House Bill 578 repealed §§210.105, 210.107 and 210.108 and enacted §§210.110 through 210.165. Definitions of abuse and neglect were included for the first time. Those required to report abuse could still use a standard of “reasonable cause to believe” abuse had occurred but were also required to take into account "conditions or circumstances which would reasonably result in abuse or neglect." At the same time, a provision for permissive reporters was added. All reports of abuse or neglect were to be made only to the Division. Section 210.145 provided for the creation of the Central Registry and §210.150 defined who was permitted access to the information in the Central Registry. However, it was not until 1994 that a definition of the Central Registry was included in the statute, and at that time the list of persons permitted access to the information

contained in the Central Registry was greatly expanded. With the exception of one further amendment in 2005, the child abuse reporting law has remained essentially the same.[4]

2. Outline of Child Abuse/neglect Appeal Process[5]

Chapter 210 and 13 C.S.R. 40-31.025 set out specific procedures for investigation of allegations of child abuse and neglect, and appealing a decision of the Division and the CANRB in child abuse and neglect cases. All reports of child abuse or neglect are called in to the Central Reporting Unit (CRU). §210.145.1. If CRU determines that there is

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[4]In 2005 the Missouri Legislature raised the evidentiary level required for the Division, or its investigators, to make a finding of child abuse or neglect. After August 28, 2004, for the Division to make a finding of abuse or neglect, there must be a preponderance of the evidence that such abuse or neglect occurred. §210.152.2-.4 (2005). Preponderance of the evidence is defined within the statutes as "that degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it or evidence which as a while shows the fact to be proved to be more probable than not." §210.110.(13) (2005). While the statute was modified in 2005, it is the 2000 version of the statute, which does not contain the preponderance of the evidence language, that is at issue in this appeal.

[5]Because this appeal does not involve the 2005 modifications to the Child Abuse statutes all statutory citations are to Mo. Rev. Stat. 2000 unless specifically noted.

enough information to merit an investigation or assessment, CRU must immediately transmit the report and any relevant information contained in the Central Registry to the appropriate local Division office. §210.145.2. Upon receipt of the report from CRU, the local office must determine whether to initiate an investigation. §210.145.3. If the local office decides to proceed, an investigation must be commenced within twenty-four hours of receipt of the report. §210.145.3. A determination must be made as to whether there is probable cause to believe that abuse or neglect occurred. Probable cause defined in statute as "available facts when viewed in the light of surrounding circumstances which would cause a reasonable person to believe a child was abused or neglected." RSMo. §210.110(10); §210.145.4

After an investigation and a finding that abuse or neglect occurred, the alleged perpetrator is entitled to written notification of local office's decision regarding the report and investigation. 13 C.S.R. 40-31.025(2). Within ninety (90) days of the report, the alleged perpetrator and parents of the victim (if they are not the alleged perpetrators) shall be provided written notification of the decision that there was either probable cause to suspect abuse or neglect or that there was insufficient probable cause to suspect abuse or neglect. §210.152.2. Contained within the alleged perpetrator's notification is information on how to seek an administrative review. 13 C.S.R. 40-31.025(2). Within sixty (60) days from receipt of the notification of the outcome of the investigation, the alleged perpetrator may make a written request for an administrative review. §210.152.3. The request must be made in writing. 13 C.S.R. 40-31.025(2)(A).

Within fifteen (15) days of the receipt of the request for an administrative review, the County Director of the local office must review the investigation and make an independent decision as to whether the decision of the local office should be upheld or reversed. 13 C.S.R. 40-31.025(2)(B). The County Director's decision must be communicated to the alleged perpetrator in writing and such communication must include information on how to seek administrative review with the Child Abuse and Neglect Review Board (CANRB). 13 C.S.R. 40-31.025(2)(C). Within thirty (30) days of receipt of any decision of the County Director decision to uphold the local office's decision, the alleged perpetrator may seek a review by the CANRB. 13 C.S.R. 40-31.025(8)(A).

If a request for administrative review is made, then the CANRB must notify the child or the child's parents, guardian, or legal representative of the request for a review 210.152.6 and 13 C.S.R. 40-31.025(8)(G). When a review has been scheduled, the CANRB must provide notice of the date and time of the review, notifying the alleged perpetrators they can either attend in person or submit a written statement to the CANRB . § 210.153.4(2) and 13 C.S.R. 40-31.025(8)(B). The CANRB also notifies the local office, which must then forward a copy of its investigation to the CANRB. 13 C.S.R. 40-31.025(8)(C).

At the review, the local office is represented by the appropriate local and area division staff and/or legal counsel. 13 C.S.R. 40-31.025(8)(D) and §210.153.4(1). The alleged perpetrator may be present alone or with legal counsel, but the alleged perpetrator's presence is not required for a review to be conducted. 13

C.S.R.40-31.025(8)(E) and §210.153.4(2). Each side may have witnesses present to provide statements about pertinent events and other requested information. 13 C.S.R. 40-31.025(8)(F) and §210.153.4(3). CANRB proceedings are closed to all persons except the parties, their attorneys, and those persons providing testimony on behalf of the parties. All CANRB proceedings are confidential. 13 C.S.R. 40-31.025(7) and §210.153.6.

The CANRB then reviews and discusses all of the relevant materials and testimony and votes on whether to uphold or reverse the finding of probable cause. 13 C.S.R. 40-31.025(8)(H). The CANRB must issue its decision within 7 days of the review. 13 C.S.R. 40-31.025(9). The CANRB must sustain the local office's decision if the decision is supported by evidence of probable cause and is not against the weight of the evidence. §210.152.4. A written copy of the CANRB decision is provided to the alleged perpetrator, the local office, and the Division Director within 35 days. 13 C.S.R 40-31.025(10).

If the CANRB decides to uphold the local office's decision, the alleged perpetrator has 60 days from the date of receipt of the CANRB's decision to seek reversal of the decision. §210.152.5. The Circuit Court is required to conduct a *de novo* trial. §210.152.5. At this trial, the victim and reporter cannot be compelled to testify. §210.152.5.

D. The Trial Court's Order

The trial court held that the statute was facially unconstitutional under the Fourteenth Amendment to the U.S. Constitution and Article 1, §§ 2 and 10 of the

Missouri Constitution, in that it violates the liberty or property rights of those persons whose names are entered in the Central Registry. App. p. 1 and 9. This, according to the trial court, offends due process because such persons had not been previously convicted of a crime and had not been afforded a hearing prior to entry of their names in the Central Registry. App. p. 1.

The trial court specifically held that the Act must possess the following elements in order to past constitutional muster:

> A neutral decision-maker;
>
> Testimony under oath or affirmation by all witnesses;
>
> Observance of regular and established Missouri rules of evidence;
>
> The right of the accused to compel the testimony of witnesses to the same extent their testimony can be compelled by the Respondent;
>
> The right to cross-examine all witnesses; and
>
> Adherence to a "preponderance of the evidence" rather than "probable cause" standard of evidence.

App. p. 10.

In coming to this conclusion, the trial court stated that respondents had suffered damage to personal and professional reputations, and that the findings of the CANRB placed their nursing licenses in jeopardy. App. p. 6-7. Further, the trial court stated that

respondents have "liberty and property interests in their reputation, their nurse's licenses, and their ability to seek employment in their chosen profession." App. p. 7.

In discussing the statute's due process infirmities, the trial court stated that respondents did not receive a hearing at a meaningful time, were not provided a hearing prior to being denied their liberty or property, did not receive a hearing before a neutral decision-maker, and that all testimony was conducted without the taking of an oath and not subject to cross examination. App. p. 8-9. The trial court also stated that holding the hearings using a probable cause standard, and not applying the Missouri Rules of Evidence, violated due process. App. p. 8. Further, the trial held that the probable cause standard was also deficient at the trial court level. App. p. 9. Finally, the trial court stated that the inability of the accused party to subpoena either the victim or the reporter to either the CANRB or the trial court constituted a violation of due process because the State can compel the attendance of those individuals. App. p. 9.

POINTS RELIED ON

I.

The trial court erred in holding that the §§210.110 - .152 violated the Due Process Clause of the United States and Missouri Constitutions because §§210.110 - .152 does not burden any protected liberty or property interests in that Missouri's child abuse registry system places no burden on employment.

Paul v. Davis, 424 U.S. 693, 711-12 (1976).

Valmonte v. Bane, 18 F.3d 992, 1001 (2nd Cir. 1994).
Neal v. Fields, 429 F.3d 1165 (8th Cir. 2005).
Dupuy v. Samuels, 397 F.3d 493 (7th Cir. 2005).

II.

The trial court erred in declaring §§210.110 - .152 unconstitutional under the Due Process Clause of the United States and Missouri Constitutions because any person potentially deprived of a property or liberty interest is afforded notice and an opportunity to be heard in that an administrative finding of probable cause to suspect abuse or neglect is preceded by an investigation, and followed by multiple levels of administrative hearings, culminating in a full trial de novo on the merits.

Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976).
Cavarretta v. Dept. of Children and Family Serv., 660 N.E. 250 (Ill. App 3d 1996). *In re Preisendorfer*, 719 A.2d 590 (N.H. 1998).
Dupuy v. McDonald, 141 F. Supp. 2d 1090 (N.D. Il. 2001).

STANDARD OF REVIEW

This was a de novo judicial trial to the court pursuant to §210.152. The judgment in a court-tried case will be sustained unless it is unsupported by substantial evidence, against the weight of the evidence, or erroneously declares or erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

The issue of whether a statute is unconstitutional is purely a question of law, the review is *de novo*, and no deference need be given to the trial court's reasoning. *State v.*

Smith, 988 S.W.2d 71, 75 (Mo. App. 1998). A statute is clothed with a strong presumption in favor of constitutionality: An appellate court must presume that a contested statute is constitutional and it may only find a statute to be unconstitutional if it clearly contravenes a specific constitutional provision. *State v. Kinder*, 89 S.W.3d 454 (Mo. 2002); *State v. Young*, 695 S.W.2d 882 (Mo. banc 1985). A statute must be interpreted to be consistent with the constitution of the United States if at all possible and any doubts concerning the validity of the statute are to be resolved in favor of its validity. *Id.* at 883-884.

Finally, Missouri's Due Process Clause is interpreted similarly to the federal Due Process Clause. *See, e.g.*, *Moore v. Board of Educ*., 836 S.W.2d, 943 (Mo. banc 1992). For this reason, the legal analysis in the following brief that pertains to the federal constitution is also applicable to the Missouri constitution. Federal constitutional review in general is disfavored where there is an independent and adequate state law ground of decision. *Harris v. Reed*, 489 U.S. 255, 262 (1989).

ARGUMENT

I.

The trial court erred in holding that the §§210.110 - .152 violated the Due Process Clause of the United States and Missouri Constitutions because §§210.110 - .152 does not burden any protected liberty or property interests in that Missouri's child abuse registry system places no burden on employment.

Before an analysis of what procedural safeguards Missouri has instituted in the child abuse and neglect realm, respondents must make a threshold showing that they have been subjected to a deprivation that triggers due process protection.

The Due Process Clause is implicated when a person is deprived of an interest in life, liberty or property through state action. U.S. Const. amend. XIV, § 1. This involves a two step analysis: The right in question must be identified, and then the process due, if any, is identified. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). Here, the right petitioners claim was violated was to have their future employment unimpaired by their inclusion in the state registry. They then claim that the review procedures provided by Missouri, with regard to the registry, are constitutionally inadequate. Petitioners' claims fails.

A. Petitioners' inclusion in the state registry, while a stigma, is not by itself unconstitutional without something more (the stigma plus test).

It is well-settled that an individual has no cognizable liberty interest in his reputation; consequently, when a state actor makes allegation that merely damages a person's reputation, no federally protected liberty interest has been implicated. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976). Indeed, mere defamation by the government does not deprive a person of liberty protected by the Fourteenth Amendment, even when it causes serious impairment of one's future employment. *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 548 (7th Cir. 2002). Reputation alone, apart from some more tangible interests such as employment, is neither "liberty" nor "property" and does not invoke the procedural protection of the Due Process Clause. *Paul*, 424 U.S. at 701-702. Rather, it is only the alteration of legal status, such as governmental deprivation of a right previously held, which combined with the injury resulting from the defamation, justifies the invocation of procedural safeguards. *Paul*, 424 U.S. at 708-09. As such, it is only when a state actor casts doubt on an individual's reputation in such a manner that it becomes virtually impossible for the individual to find new employment in his chosen field that the government has infringed upon that individual's liberty interest to pursue the occupation of his choice. *Townsend v. Vallas*, 256 F.3d 661, 670 (7th Cir. 2001).

The dissemination of the fact that a person's name is in the abuse and neglect registry may create a stigma and can be damaging to that person's reputation. See, e.g., *Valmonte v. Bane*, 18 F.3d 992, 1000 (2nd Cir. 1994) ("Since [perpetrator] states that she

will be applying for child care positions, her status [on the registry] will automatically be disclosed to her potential employers. Having your name on Missouri's abuse and neglect registry does create a stigma, but that, in and of itself, does not deprive a person of a liberty or property interest.

B. Missouri's registry-checking requirements do not impose a burden on present or future employment.

To the extent respondents claim that they will not be able to gain employment in the child care field because potential employers must check the registry, such a claim fails as a matter of law. Having one's name in a child abuse and neglect registry is a stigma–that is, it could be damaging to a person's reputation. But that damage by itself is not enough. Relevant here, though is whether the law places additional burdens on employment–whether by requiring that a person on the registry be dismissed from employment, a probationary hire, whether employers must maintain written records of the reason for employment, or whether the status effects any licensing. *Paul*, 424 U.S. at 701-702.

The crux of respondents' argument below was that Missouri law branded them with the stigma of child neglect and they will likely be unable to obtain employment in their chosen profession. But respondents failed to point to evidence showing that the child abuse statutes (RSMo §210.109 to §210.183) place any additional burden on employment. Respondents did not state that their employer is required to maintain reasons for their employment, that they are required to be probationary employees, or that

they have been terminated from their employment. Respondents simply argued that their employer is required, by law, to check the registry, and without more this does not implicate a liberty interest. *Paul*, 424 U.S. at 701-702. Missouri statutes do not tell an employer what to do with the information obtained by the mandatory check. Plainly, the Missouri legislature intended that employers who are responsible for the welfare of children are informed**.** Missouri does not, then, go on to place an additional burden on an employer that is peculiar to an employee whose name is in the registry.

However, some states to place an additional burden on employment. New York requires a check of their abuse registry much like Missouri's provisions require, but it also requires more. *Valmonte v. Bane*, 18 F.3d 992, 1001 (2nd Cir. 1994). If a person's name appears in the New York registry the potential employer may only hire the applicant if the employer "'maintains a written record . . . of the specific reasons why such person was determined to be appropriate' for working in the child or health care field." *Id.* at 996 (citations omitted). In other words, the statute not only requires the employer to check the registry but also imposes an additional burden on the employer just to hire a person–a requirement that shows a very different intent on the part of the legislature of that state. Missouri's statute imposes no such additional burden.

The Second Circuit's analysis of this issue, the requirement of an additional burden, following *Paul v. Davis,* is quite clear: The negative effects from defamation or injury to reputation are not cognizable under the Due Process Clause. "These would normally include the impact that defamation might have on job prospects[.]" *Valmonte*,

18 F.3d at 1001. Distinguishing their case from the general rule in a manner that would also distinguish respondents' position, the Second Circuit stated that the New York law went well beyond injuring the plaintiff's reputation. The plaintiff alleged that she would not be hired because her inclusion on the list forced a potential employer to explain why she *should* be hired. *Id.* Moreover, she alleged generally that employers simply would not hire her. The *Valmonte* court summarized this issue quite succinctly:

> This is not just the intangible deleterious effect that flows from a bad reputation. Rather, it is a specific deprivation of her opportunity to seek employment caused by a statutory impediment established by the state. Valmonte is not going to be refused employment because of her reputation; she will be refused employment simply because her inclusion on the list results in an added burden on employers who will therefore be reluctant to hire her. *Id.*

Further, in the recent case of *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005), the Seventh Circuit applied *Paul* and *Valmonte* to hold that an Illinois child abuse and neglect registry went beyond simple reputational damage. As with the Second Circuit, the Seventh Circuit was very clear in holding that the Illinois statute raises Due Process concerns because of the added burden placed on employers, which was identical to those placed on employers in *Valmonte*:

> Illinois law requires prospective employers to consult the central register before hiring an individual and to notify DCFS in writing of its decision to

> hire a person who has been indicated as a perpetrator of child abuse or neglect. In short, placement of an individual's name on the central register does more than create a reputational injury. It places, by operation of law, a significant, indeed almost insuperable, impediment on obtaining a position in the entire filed of child care.

Dupuy, 397 F.3d at 511.

As Missouri law simply requires certain employers to check, but to do nothing else, respondents cannot claim that Missouri law requires an employer to do something for a person whose name is on the registry that is distinct from the treatment of others. Missouri law applies to all, and the burden is similar to all.

Respondents also argued below that the reporting statute is unconstitutional because: (1) Faith House "**could** have its [operating] license revoked;" (2) both petitioners "**may** have their [nurses] licenses revoked" because they are on an employee disqualification list; and (3) the **Department of Health and Senior Services** (DHSS) has stated that Jamison cannot be present during Faith Houses hours of operation. However, these arguments are flawed for two reasons.

First, with the exception of the DHSS order which will be addressed later, the potential that Faith House may lose its operating license, and that respondents may lose their nursing licenses, does not amount to a current impediment to employment. As the U.S. Supreme Court stated, mere defamation by the government does not deprive a person of liberty even when it causes "serious impairment" of one's "future

employment." *Siegert v. Gilley*, 500 U.S. 226, 234 (1991); *Hojnacki*, 285 F.3d at 548. Respondents do not allege that they have lost their licenses and that they cannot be employed, only that they might lose them at some point in the future. As both the courts in *Valmonte* and *Dupuy* accurately identified, it is the current impediment to employment, namely that employers were required to check the register and maintain reasons for hiring an employee, that creates a liberty interest, not an uncertain assumption that their might be some injury in the future.

Further, if respondents have been notified that they might placed on an employment disqualification list,[6] then there are substantial procedures in place for petitioners to appeal that decision. See *Tate v. Dept. of Soc. Serv.*, 18 S.W.3d 3 (Mo. App. E.D. 2000) (setting forth the administrative review procedures for certified medical technician who was placed on an employment disqualification list).

An individual, who has a valid nurses license in the state of Missouri, can have their name placed on the disqualification list if there has been a report that the licensee abused or neglected an individual. RSMo. §660.300 (2000). Similar to Missouri's abuse and neglect statute, once a report has been made, and investigation is conducted into the

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[6]If a final determination is made that an individual with a nursing license should be placed on the employee disqualification list, then that individual cannot be employed by licensed in-home facility that employs nurses and nursing assistants. See RSMo. §660.315.11-12 (2000).

abuse and a determination is made whether the individuals name should appear on the disqualification list. RSMo. §660.300 (2000). Once that determination is made, the individual who's name has been placed on the list is notified of the reasons for the listing, and is also notified of their rights to appeal the determination. RSMo. §660.315.1 (2000). Once the individual has stated their desire for a hearing, their name is removed from the disqualification list. RSMo. §660.315.4 (2000). Once the Department receives a request for a hearing, then the individual is granted a hearing that comports with the contested case provision of chapter 536. RSMo. §660.315.5 (2000). At the hearing, in compliance with chapter 536, the individual has the right to cross examine witness under oath, present witnesses, evidence is taken on a record pursuant to Missouri rules of procedure, and can subpoena witnesses. RSMo. §536.070 (2000). In other words, respondents would be offered a great deal of process at their disqualification hearing.

Further, if respondents do not agree with the final findings at the hearing, they then have the right to seek judicial review of those findings pursuant to chapter 536. RSMo. §660.315.7 (2000). It is not until after a finding after the hearing, which was not appealed, or until all judicial remedies have been exhausted, that an individuals name is placed on the disqualification listing, and even then that listing may not be permanent. RSMo. §660.315.4-12 (2000). Finally, an individual may even petition to have their name removed from the disqualification list every twelve months. RSMo. §660.315.13 (2000). Simply because there is a potential that petitioners may have to utilize these processes does not mean that there is a current impediment to their employment.

And, if Faith Houses' license is suspended, there are procedures for the facility to appeal the suspension then they are also entitled to process as provided by chapter 536 and as outlined previously. See 13 CSR 40-71.030.

Further, the fact that a nursing license may be suspended because of an obligation placed on it by statute, does not amount to a constitutional deprivation. This issue was recently addressed by the Eighth Circuit in *Neal v. Fields*, 429 F.3d 1165 (8th Cir. 2005). In *Neal*, Neal argued that the Arkansas State Board of Nursing violated her due process rights when it red flagged her nursing license because she was under investigation. *Id* at. 1166. Neal argued that because her license was red flagged and disclosed to a prospective employer, prior to having a due process hearing, that her rights were violated. *Id.* Further, Neal claimed that the disclosure of the investigation created an "injurious cloud on her fitness as a nurse." *Id.* at 1167-1168. In addressing these issues the Eight Circuit first concentrated on the fact that Neal's license had not been suspended, only placed under investigation. *Id.* Because her license was only under investigation, and had not been suspended, the Eighth Circuit held that Neal failed to allege any deprivation of a protect property interest. *Id.* In continuing this reasoning the Eighth Circuit also recognized that Arkansas law does not contemplate licensing free of regulation and that Arkansas law specifically provides for suspension and revocation of nursing licenses. *Id.* Further, the Eight Circuit recognized that Arkansas law provides a panoply of due process rights in the event that the Arkansas Nursing Board decides to suspend or revoke a

license. *Id.* As such, the Eighth Circuit held that Neal failed to allege any constitutional deprivation.

Alternatively, Neal also argued that because her license was red flagged, the Nursing Board subjected her to a stigma that foreclosed her ability to seek or gain other employment. *Id.* at 1167. In regards to that claim, the Eighth Circuit stated that because the Board only disclosed the investigation itself, that the injury to her reputation alone was not sufficient. *Id.* at 1167-1168.

Similar to *Neal*, respondents' argument fails in regards to the licensing issues, and DHSS's order to Jamison For two reasons. First, neither of respondents' licenses have been suspended; they have only stated that they could be disciplined or placed on a disqualification list. LF 68-72. Second, it is not the child abuse statutes which would disqualify their nursing licenses but RSMo. § 660.315.

First, as the *Neal* case points out, there can be no constitutional deprivation of a liberty or property right in a professional license where that license has not been suspended or revoked. Neither of the respondents has ever claimed that their license, or Faith Houses' operating license, has been revoked or suspended, only that the determination by the CANRB "could affect" or could result in "discipline" of their licenses. LF at 69 and 71. Further, identical to the *Neal* case, Missouri law does not contemplate professional licensing, or facility licensing, absent regulation or the potential

that a license may be suspended or revoked. See Mo. Rev. Stat. 335.066[7] and 660.315. Further, Missouri provides a panoply of procedures before respondents' licenses could be disciplined, which respondents have not even begun to utilize. See, *id.* Because neither of respondents' licenses have been revoked or suspended, and because the facilities license has not been suspended, there can be no constitutional deprivation in regards to their licenses by having respondents' names listed in Missouri's abuse registry.

As to the second flaw in respondent's argument, the Court in *Valmonte* stated it was the portion of the New York child abuse statute that mandated that employers justify hiring which implicated a liberty interest. *Valmonte*, 18 F.3d 1001. Similarly, the *Dupuy* Court also recognized that it was the section of the Illinois child abuse law that required employers to consult the registry, which implicated a liberty interest. *Dupuy*, 397 F.3d at 511. Here, it is not Missouri's child abuse statutes that, even potentially, create an impediment to employment but RSMo §335.066, §660.315, 19 C.S.R. 30-62.102, and 13 C.S.R. 40-71.030. In other words, petitioners' arguments fail because they claim that the

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[7]An individual with a nursing license may also have their license revoked or suspended under RSMo. § 335.066 if their name appears on a disqualification list. RSMo. §335.066.2(15). If the revocation pursuant to chapter 335, then the licensee can either pursue an appeal before the Administrative Hearing Commission (chapter 621), where they are entitled to notice, a hearing, and judicial review, or can request a contested hearing pursuant to chapter 537. RSMo. §§ 335.066.3, 621.045.

child abuse statutes are unconstitutional, but point to impediments not created by the child abuse statutes, but by other statutes.

Therefore, petitioners have failed to show that they have a protectible liberty interest that implicates due process.

II.

The trial court erred in declaring §§210.110 - .152 unconstitutional under the Due Process Clause of the United States and Missouri Constitutions because any person potentially deprived of a property or liberty interest is afforded notice and an opportunity to be heard in that an administrative finding of probable cause to suspect abuse or neglect is preceded by an investigation, and followed by multiple levels of administrative hearings, culminating in a full trial de novo on the merits.

A. The probable cause standard

The trial court held that the probable cause standard used to review the decisions of the DFS investigation is too low a standard.

While the trial court held that the "probable cause" standard is to low for the initial investigation and subsequent appeals, many cases hold that a much lower standard, one of "some credible evidence," is sufficient in the initial investigation and in the later review proceedings. While the "some credible evidence" standard is generally not considered to be problematic at the initial investigative stage, it does play a role in determining what process is due at a later stage. See, e.g., *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1136 (N.D. Il. 2001) ("the court emphasizes that the use of a 'credible evidence' standard at the investigation stage is not, by itself, impermissible.") The problem, as the court in *Dupuy* saw it, was that "some credible evidence" was too low a standard prior to disseminating information from the registry. *Id.* However, that is not a concern with Missouri's statue

because Missouri employs a higher "probable cause" standard of proof at the investigation stage prior to disseminating information contained in the registry.

Although the Illinois statute, like Missouri, used the term "probable cause," the plaintiff in *Dupuy*, unlike respondent here, presented the court with *evidence* that "probable cause" was interpreted through training of investigators to mean that "'any' credible evidence of abuse or neglect is sufficient, and thus, investigators gather only inculpatory evidence and disregard any evidence weighing against in indicated finding." *Id*., at 1135. In other words, if any piece of evidence is credible, it is sufficient for a finding of abuse, and for a perpetrator's name to be disseminated before any level of hearing takes place.

In very stark contrast, while Missouri's definition of probable cause is very similar to the one in Illinois, Missouri's "standard" requires a balancing of evidence. Specifically, Missouri's statute requires an investigator to use all "available facts viewed in the light of surrounding circumstances which would cause a reasonable person to believe a child was abused or neglected." § 210.110(1) RSMo (2000). This definition not only calls for a weighing of evidence, but also a consideration of all available facts, not just some of them, or just those that are apparent; and it requires a reasonable person standard for the formation of a belief, not a mere suspicion.

In holding that the probable cause standard is to low, the trial court relied on three cases which are easily distinguishable from the present case.

The trial court first relied on *In re Preisendorfer*, 719 A.2d 590 (N.H. 1998), for the proposition that a listing on the abuse and neglect registry on a finding on probable cause is constitutionally insufficient. However, this was not entire holding of the New Hampshire Court of Appeals. In *Preisendorfer*, a school teacher was found to have sexually abused three children, and after a hearing and review, had his name placed on the registry which caused him to loose his teaching position. *Id.* at 591-92. The Court in *Preisendorfer* specifically held that:

> due process requires that the preponderance of the evidence standard apply in any hearing to determine whether an individual's name should be added to the central registry . . . where that individual would be *excluded* from working in his or her profession due to that listing . . . .

Id. at 595 (emphasis added). In other words, because Priesendorfer was barred from working in his profession because his name was placed on the registry, the preponderance of the evidence standard was constitutionally required.

As is obvious, the present case differs markedly from *Priesendorfer* because there is no requirement that respondents cease working in their chosen field. In fact, there is no requirement under Missouri law that just because respondents names are on the registry that they cannot continue to work in their chosen fields. Further, as was discussed previously, there is no evidence, nor was there any put forth before the trial court, that respondents have had their licenses disciplined or revoked because of their inclusion on

the abuse registry. In fact, at the trial court, it appears from the evidence put forth by respondents that they were able to continue working in their chosen field.

Second, the trial court relied on *Cavarretta v. Dept. of Children and Family Serv.*, 660 N.E. 250 (Ill. App 3d 1996). This Illinois case, too, case can be distinguished on its face. First, as pointed out in *Dupuy*, the Illinois statute is very dissimilar from the Missouri statutory regime in that the Illinois statute has a direct effect on employment, namely employers must maintain reasons for employment. Further, as the Illinois Court of Appeals pointed out in *Cavarretta,* the "credible evidence" standard applied in Illinois did not require that the fact finder weigh conflicting evidence at a hearing. *Id* at 258; see also *Dupuy* 397 F.3d at 504-05. Here, there has been no finding, nor is there any indication, that anyone disregarded exculpatory evidence, or that such disregard is common-or even permissible-under Missouri law.

Finally, the court cited to *Valmonte,* which, as with the other cases cited by the court, can be distinguished from the current case. The court in *Valmonte,* like the other courts in *Priesendorfer* and *Cavarretta,* found that the "some credible evidence" standard was too low. But it did so only after a showing that seventy-five percent of all people who were initially placed on New York's registry ultimately were removed from the list, and that there was a tangible effect on employment. *Valmonte,* 18 F.3d at 1004. Specifically, not only was there an evidentiary finding regarding the removal rate from New York's registry, but the New York statute, as stated previously, also placed a tangible burden on employment. *Id.* at 1003-004. Again, not only does the Missouri

statute not place a tangible burden on employment, but there has been no finding that the probable cause standard results in an excessive rate of erroneous placements on Missouri's register.

Further, while the trial court did state that there was reversal rate of about "35 to 40 percent," there was little evidence presented as to what these numbers mean. What is readily apparent is that the trial court seemed to be implying that the CANRB and trial courts serve in a function similar to a state appellate court. Specifically, by using the term "reversed" the trial court implies that the CANRB and trial courts are simply limited to reviewing the initial findings of the investigator, and cannot look to any other evidence, similar to appellate court review. This is simply incorrect. As RSMo § 210.153 states, the CANRB "provide[s] an independent review of child abuse and neglect determinations . . . ." The CANRB is not limited to simply reviewing the finding of the investigator. The CANRB can not only review the investigator's findings, but is also empowered to hear and consider additional evidence put on by the aggrieved individual or the DSS, that the investigator may not have been aware of at the time of the initial determination of abuse. RSMo § 210.152.4 (2000), see also 13 C.S.R. 40-31.025(8). Further, as this Court is well aware, when an aggrieved individual applies for de novo review in the circuit courts, the circuit courts are not simply limited to the findings of the investigator, as an appellate court is limited to the findings and record of a circuit court, but a full fledged trial is held where new evidence can be presented by both parties.

The trial court's reliance on the "35 to 40 percent" reversal rate is also a far cry from the evidence presented in *Valmonte*, which the Second Circuit found troublesome. In *Valmonte*, there was a specific finding, after an evidentiary hearing that of all of the individuals who sought administrative review some seventy-five percent of those individuals successfully had their findings unsubstantiated. *Valmonte*, 18 F.3d at 1003. Further, the Second Circuit also pointed out that, according to the evidence presented to them, only twenty-five percent of those individuals on the abuse list remain after all administrative proceedings were concluded. *Id.* at 1004.

Here, the evidence is nowhere near as troubling as that in *Valmonte*, assuming that their evidence was even admittable at the summary judgment stage, as it appears to be based on speculation. At best, assuming the evidence is admissible, it show that maybe thirty-five to forty percent of all findings that are appealed are unsubstantiated, not all initial findings as was the evidence in *Valmonte*. Respondents, during summary judgment, presented no evidence as to whether the quoted percentage relates to all initial findings of abuse and neglect, or just those individuals who appeal their determinations of abuse or neglect. Even assuming that every individual who has a substantiated finding of abuse or neglect at the investigation stage appeals, that means that a full sixty to sixty-five percent of those individuals permanently remain on the abuse and neglect registry. Unlike *Valmonte*, where the evidence showed a serious flaw in the New York procedures, in Missouri our investigators are correct sixty to sixty-five percent of the time, unlike New York's investigators who were correct only twenty-five percent of the time.

To the extent the trial court held the probable cause standard is to low for the de novo court trial, that holding is incorrect for two reasons.

First, in Missouri, a full trial is afforded, subject only to the prohibition of compelling the presence of the reporter and the victim. The standard at such a trial is most likely a "preponderance" standard, as is common in civil proceedings. But here, it is of negligible consequence since Missouri defines "probable cause" to be substantially the same as a "preponderance of the evidence." *See,* § 210.110(13) and (14) (2005). Unlike the criminal context in which probable cause is indeed a very low standard, the child protection statutes force a consideration of all available evidence, a weighing of that evidence, and a determination as to what is a reasonable conclusion from that evidence.

Further, neither RSMo §210.110 or §210.152.5 indicates what level of evidentiary review is to apply to de novo reviews from the CANRB. While §210.152.4 does conclusively state what evidentiary review is to be applied at the administrative level, "probable cause," it does not indicate what level it to apply at the trial level. Further, §210.152.5 is completely silent on the issue of what evidentiary standard is to apply at the trial de novo. While *Williams v. State*, 978 S.W.2d 491, 494 (Mo. App. S.D. 1998) indicates in dicta that a trial court reviews a CANRB determination of abuse and neglect using the "probable cause" standard, there is nothing in the statute to support that contention. Therefore, while the probable cause standard is appropriate at the trial level and administrative level, there is nothing binding this court to apply that level of review.

B. The inability to subpoena the victim and reporter for trial does not deny a perpetrator any due process rights.

It is true, as the trial court stated in its order, that Missouri law does not permit a perpetrator to compel the attendance of the victim or the reporter of the abuse. § 210.152.5. However, at a trial *de novo*, the court is to decide the case anew on the evidence before the court. *See Williams*, 978 S.W.2d at 494.

It appears that respondents are claiming a right of confrontation similar to that in the criminal context. But even that right is not unlimited. For instance, it is a well established rule that criminal defendants do not have unlimited ability to compel disclosure of a state's confidential informant; in effect preventing the criminal defendant from calling that person as a witness, or being able to cross examine them. See generally, *State v. Rollie*, 962 S.W.2d 412 (Mo. App. W.D. 1998) (upholding a state court's decision to deny a motion to compel disclosure of a confidential informant). Further, it can hardly be argued that a civil defendant in a child abuse hearing has a greater interest than a criminal defendant, who faces the possibility of a felony conviction and incarceration, in seeking to compel disclosure of an individual who has information relating to the charges against them. But that right is limited in the criminal context.

None the less, witnesses are sometimes unavailable, and this rule does not change the rules of evidence at all–it does not make admissible hearsay statements of either of these witnesses. Further, without this prohibition, abusers would have the power and ability to place their child victims on the stand at trial subject to potentially emotionally

devastating cross examination. And it is plainly obvious that the state would have the utmost interest in protecting children (the victims) and encourage the reporting of abuse (the reporter). While the statement of the victim and the reporter are two sources of evidence are used by the initial investigators, their absence at trial would not seem to prejudice the perpetrator unless Missouri law provides for the admission of their testimony by un-cross examined affidavit.

If indeed there is a violation of due process in prohibiting the calling of the victim and reporter, it is not a facial problem with the statute; and (again) the perpetrators have not produced any evidence as to how this is problematic as to them. Further, there is no carte blanc prohibition against the victim or reporter from voluntarily being called by the alleged perpetrator to testify on their behalf, there is only a prohibition against them being subpoenaed by the alleged perpetrator.

C. The *Mathews v. Eldridge* 3-Part Test

Not only did the court hold that the inability to subpoena the victim and reporter violated the due process rights of the respondents, but it also also held that the statute does not provide for a constitutionally adequate hearing at a meaningful time.

The U.S. Supreme Court has established a three-part test to answer the question of what process is due. A court must consider (1) the private interest that will be affected by the governmental action; (2) the risk of erroneous deprivation through existing procedures; and (3) the government's interest and burdens imposed by additional process. *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). In applying this test the Supreme

Court has held that, in general, due process requires "some kind of hearing before the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S 113, 115 (1990). In other cases, however, the court has determined that "a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation satisfies due process." *Id.*

Because one of the considerations involves an assessment of the risk of an erroneous decision, it is unfortunate that there was no valid evidence presented to the trial court that the procedures as they currently exist in statute lead to erroneous deprivations.[8]

1. The private interest that will be affected by the governmental action.

In the instant action there is no evidence that respondents have been denied employment or the opportunity to seek employment.[9] Further, respondents have also failed to establish that there has been any adverse action taken against their nursing licenses. When combined with the complete absence of a statutory burden on employment, there is no “private interest” to consider from a constitutional standpoint.

2. There was no showing that the reversal rate bears on the validity of the initial procedures.

[8]See Point II section A

[9]See Point I

Respondents fail to present any evidence on this issue. However, a review of the administrative process available to petitioners is illustrative of the number of procedures in place in the administrative context and trial court to prevent erroneous decisions.

i. Procedures during administrative de novo review.

At the CANRB as well as the circuit court, alleged perpetrators are permitted to present their own evidence. § 210.153. At the CANRB review, testimony cannot be compelled, but perpetrator could appear in person, submit materials in writing, and present witnesses. *Id.* At the CANRB, there is no statutory provision that limits what the alleged perpetrator may submit, whether in writing or in person. §§ 210.152.3; 210.153.4. In other words, the case before the CANRB might well be a different case than the one before the investigators. Further, the alleged perpetrator is provided neutral decision makers through the CANRB because those individuals are not employees of the DSS and are appointed by the governor from a wide body of individuals. See. RSMo. § 210.153 (2000). Finally, if the alleged perpetrator is dissatisfied with the outcome at the CANRB, they have the right to seek de novo judicial review at that circuit courts. RSMo. § 210.152.

Relief is not available only at the CANRB. It is also available at the circuit court, which hears the case *de novo* and is not simply a limited review. Just as at the CANRB hearings, petitioners have a fresh opportunity to protect their interests.

The procedures to protect petitioners here are similar to those at issue in *Mathews,* where the U.S. Supreme Court underscored the plain fact "that statistics rarely provide a

satisfactory measure of the fairness of a decision making process. Their adequacy is especially suspect here since the administrative review system is operated on an open-file basis. A recipient may always submit new evidence[.]" *Mathews*, 424 U.S. at 346-347.

Assuming, though, that petitioners at the very least denied the allegations or, at best, presented evidence of non-culpability, the question of the risk of an erroneous decision still must revert back to a consideration of the importance of the right that is alleged to be infringed. This is simply a matter of logic. For example, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the plaintiff was a welfare recipient who depended on government benefits for survival. Naturally, the Court concluded that the risk of erroneous deprivation was very serious, and this was one case in which the Court held that due process required a pre-termination hearing. In contrast, the plaintiff in *Mathews* was an applicant for disability benefits. Such benefits are important, but the Court correctly observed that such benefits are not dependent on need: An applicant qualifies if they are unable to work according to certain criteria regardless of their monetary support, etc. That Court found that process was due, but a pretermination hearing was not.

Likewise, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the U.S. Supreme Court again held that pre-deprivation hearings were not required in the context of a property interests. In *Loudermill*, several employees of the Cleveland Board of Education were terminated without having any opportunity to respond to the allegations made against them. *Id.* at 535. The *Loudermill* Court held that, even though continued employment with state government was a property interest, the appellants were

not entitled to a full evidentiary pre-deprivation hearing. *Id.* at 545-46. In fact, the Court held that all that was required prior to termination was notice and an opportunity to be heard because there were adequate post deprivation remedies through administrative review. *Id.*

Even considering, for the moment, that having one's name listed on the registry invokes a property or liberty interest, and that it is as severe as having ones gainful employment terminated, alleged perpetrators are provided with all the due process that is required. Alleged perpetrators are provided with all the process constitutionally required because they are provided with notice and an opportunity to be heard through the initial notice from the DFS and through the interview process with investigators. Further, like in *Loudermill*, alleged perpetrators are also provided with a panoply of post deprivation rights through both an administrative appeals process and de novo trials, which satisfies due process.

It strains credulity to conclude, as respondents here would urge, that the possibility that they may be, at most, inconvenienced in possible future job searches in a limited field, and in the relatively short time span between the close of the investigation and the hearing before the CANRB, is a greater potential deprivation than the receipt of **benefits for a condition that prevents a person from working generally.**

3. The government's interest.

The third and final consideration in the *Mathews* balancing test is the Government's interest. It is well settled that the state has a compelling interest in

protecting the welfare of children who may be subject to abuse, even against a parent's liberty interest in being free to raise children without government intervention. *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987). State legislatures have "broad power to enact laws to protect the general health, welfare and safety." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423-424 (1952). This Court has held that the states "have been given deference in adopting reasonable summary procedures when acting under their police power." *State ex re. Williams v. Marsh*, 626 S.W.2d 223, 231(Mo. 1982) (citing *Mackey v. Montrym*, 443 U.S. 1, 17 (1979). Legislation protecting vulnerable populations of people who cannot protect themselves such as children, the infirm, and the elderly are a legitimate exercise of a State's police powers. *Stiffelman v. Abrams*, 655 S.W.2d 522, 528 (Mo. banc 1983).

This Court has noted that the problem of child abuse had "reached epidemic proportions" in the State of Missouri. *State ex rel. D.M. v. Hoester*, 681 S.W.2d 449, 452 (Mo. banc 1984).

a. The protection of children from abuse and neglect.

Missouri has two distinct interests at stake in child abuse and neglect cases. The first is the protection of the child from further abuse and neglect by investigating cases of abuse and neglect, making certain that information about the cases get to the persons, employers, and agencies who are responsible for protecting the child and providing appropriate legal procedures to protect the child victim in the future. This interest is civil and administrative, not punitive. In Missouri this interest is addressed by the child abuse

and neglect hotline reporting system under § 210.109 - .152, the Juvenile court system under Chapter 211, and other civil remedies and procedures for the handling of child custody cases under Chapters 210 (paternity cases), 452 (divorce), 453 (adoption) and 455 (adult abuse and orders of child protection).

The second interest is the punishment of perpetrators and to deter prospective perpetrators from committing offenses in the future. This interest is criminal and punitive in nature and is addressed by the criminal code, Chapters 565 (crimes against persons), 566 (sexual offenses), 568 (crimes against the family), etc.

With respect to noncriminal objectives, the state has a clear and compelling interest in making an early, initial determination based on available information and placing available information into the Central Registry on an expedited basis. In child abuse and neglect cases the state clearly has an urgent interest in having an expedited process and only sufficient due process procedures before the name of an alleged perpetrator is included in the Central Registry than the ordinary governmental employer because the state has a compelling interest in protecting vulnerable children who cannot protect themselves from child abuse and neglect. It goes without saying that child abuse and neglect cases sometimes involve cases in which a child may be at risk of serious injury or death or cases where the child is being subjected to serious neglect or other emotional trauma. § 210.145.4.

b. The Missouri system is narrowly tailored.

Chapter 210 does not permit the wholesale disclosure of the identities of alleged perpetrators of child abuse and neglect to *all* prospective employers. §210.150.2. There are, in fact, only a limited number of instances where identifying information regarding an alleged perpetrator may be released to a prospective employer under the law being attacked in this case.

The first instance is provided for in §210.150.2(8) where certain classes of employers may request a check of the Central Registry to determine if there are any probable cause findings of child abuse or neglect. The only employers who are entitled to request such a records check are employers who play a significant role providing care for and supervision of children, such as schools, child care facilities, and child placing agencies. The law also permits recognized agencies that provide training or make recommendations for employment or voluntary positions that involve the provision of care and services to children to request a records check. *Id.* The request must be made in writing and responded to in writing in the manner provided by law. The state has a compelling interest in disseminating available information to such employers so that the employers of people caring for children can take reasonable steps to insure that the children in their care are safe. When balancing the interests in this case, the risk of an erroneous finding of child abuse does not outweigh the interest of the state in providing relevant information for the protection of children from abuse or neglect. Requiring a full-blown evidentiary hearing under such circumstances constitutes an unwarranted intrusion

on the ability of the State to protect vulnerable children from abuse or neglect, and to narrowly disseminate information relevant to that task.

The second instance where information from the Central Registry may be disseminated to prospective employers is under § 210.150.2(9) RSMo. That section permits a parent or legal guardian to request a check of the Central Registry for the name of the person or institution that the parent or guardian is considering as a service provider for their children. The same interests are implicated here as are implicated under § 210.150.2(8) discussed above. Parents and legal guardians have a compelling interest in knowing whether there is probable cause that the child care provider actually abused or neglected a child. The State of Missouri, in its role as *parens patriae* has a compelling interest in making certain that the parents and guardians have that information so that they can make informed decisions regarding child care and safety. Requiring a full blown evidentiary hearing before the name is entered in the Central Registry would constitute an unwarranted intrusion on the ability of the State to provide relevant information to those who seek it and thereby protect vulnerable children from abuse or neglect.

The third instance where information from the central registry may be disseminated, to prospective employers, is under §210.150.2(11) where the law permits the disclosure of information from the Central Registry to "any state agency acting pursuant to statutes regarding a license of any person, institution, or agency which provides care for or services to children." Again, the same considerations apply. State agencies licensing persons or institutions to care for or provide services to children have a

compelling interest in knowing whether there is probable cause to believe that child abuse or neglect was committed by the proposed licensee. Requiring a full blown evidentiary hearing before notice is given under such circumstances constitutes an unwarranted intrusion on the ability of the State to provide relevant information to those who seek it and thereby protect vulnerable children from abuse or neglect.

c. The process that is due.

Neither the federal nor the state due process clauses require a full evidentiary hearing before an administrative agency takes an initial action that may have an impact on a person's liberty or property interests, especially the kind of limited and temporary impact involved here. The U.S. Supreme Court has noted that there is only one Supreme Court case, *Goldberg v. Kelly*, 397 U.S. 254 (1970), that specifically required a full adversarial, evidentiary hearing prior to adverse governmental action, and that case applies only to the termination of certain types of government welfare benefits. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). There are many cases in which the Supreme Court has held that due process is satisfied by a simple, summary procedure where the agency gives the alleged perpetrator notice of the allegations against him and an opportunity to respond orally or in writing without a full evidentiary hearing, coupled with more extensive, post deprivation procedures given at a later date. *Barry v. Barchi*, 443 U.S. 55, 65 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story.")

d. Post-decision review.

After a name is entered in the Central Registry the alleged perpetrator has the right to request administrative review. Agency policy permits the review to be conducted by the local Circuit manager or county director who can uphold or overturn the agency's initial finding. 13 C.S.R. 40-31.025(2)(B). Any alleged perpetrator who is aggrieved by the decision of the Division is then entitled to an administrative review by the CANRB, an entity separate from the Division. § 210.153.3. The members of the CANRB are appointed by the Governor with the advice and consent of the Senate. § 210.153.2. The procedure for the selection of members of the Board insure that decisions are made independently from the determination made by the Division. The petitioners did not introduce a scintilla of evidence to show that any member of the CANRB was anything other than an unbiased, neutral decision maker.

At the CANRB hearing the alleged perpetrator has the right to appear in person or to submit written statements in lieu of personal appearance and the right to be represented by counsel. §210.153.4(2). The alleged perpetrator may also call witnesses. §210.153.4(3). It is true that there is no process available to subpoena witnesses to appear at the CANRB hearing, that testimony is not given under oath, that cross examination is not permitted, and that the rules of evidence are not observed. But this does not constitute a violation of due process. The decisions of the CANRB are accorded no deference at the trial *de novo* (as compared with the standard of judicial review of the decisions of the

Administrative Hearing Commission and other contested case decisions of administrative tribunals under Chapter 536).

At the trial *de novo* the alleged perpetrator is accorded the full range of process due under the law in civil proceedings. At this *de novo* trial, on the merits, the trial court is not bound by the agency's determination, satisfying any due process hearing requirement. *Williams v. State of Mo. Dept. of Social Services*, 978 S.W.2d 491 (Mo. App. S.D. 1998). The agency has the burden of proof, unlike actions for judicial review under Chapter 536. *Id.*

Therefore, under the *Mathews* test, alleged perpetrators are provided with adequate due process when they are provided with an notice and an opportunity to speak with an investigator, and are given multiple levels of review.

CONCLUSION

Respondent respectfully asks this Court to reverse the judgment of the trial court, and hold that RSMo 210.109 et. seq. is constitutional.

Respectfully submitted,

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I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains **11529** words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disks filed with this brief and sent to the plaintiff, containing a copy of this brief, have been scanned for viruses and are virus-free; and

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NO. SC87360

SUPREME COURT OF MISSOURI

MILDRED JAMISON, et al.,

Respondents,

v.

**STATE OF MISSOURI,
DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF FAMILY SERVICES**

Appellant.

Appeal from the Circuit Court of Cole County,
The Honorable Richard G. Callahan, Judge

APPELLANTS' BRIEF APPENDIX

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